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The Complaint in Federal Criminal Procedure

By LESTER B. ORFIELD**

RULE 3 OF THE Federal Rules of Criminal Procedure entitled "The Complaint" provides:

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

I. *History of Drafting of Rule 3*

The first draft of the Federal Rules of Criminal Procedure dated September 8, 1941 made but passing reference to the subject of complaint. Rule 3, entitled "Commencement of Criminal Proceeding" provided: "A criminal proceeding is commenced by filing a written accusation with the court. The written accusation may be an indictment, a presentment, an information or a complaint." The rule was modeled on Federal Civil Rule 3 which provides: "A civil action is commenced by filing a complaint with the court."

Rule 23 of the second draft, dated January 12, 1942, was a shortened version of the first draft. It provided: "A criminal proceeding is commenced by filing a written accusation. The written accusation may be an indictment, an information, or a complaint." An alternative rule 23 provided: "A criminal proceeding is commenced, with respect to statutes of limitation, upon the filing of

* Professor Orfield's first article was published by the Kentucky Law Journal in 1929. In his letter forwarding the manuscript for the present article, Professor Orfield noted this fact then continued, "The present article is my 101st. I thought it fitting that I start my second hundred in the same excellent journal which published my first!"

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an indictment or of an information; with respect to jurisdiction, a criminal proceeding is commenced when the defendant is arrested, or, if the defendant has not been arrested, when the defendant is first brought before the court." Rule 3 of the same draft represents a corrected version of Rule 23. It provided: "A criminal proceeding may be commenced by filing a written accusation or by an arrest without a warrant." The third draft, dated March 4, 1942, provided in Rule 1(b)(5): "'Complaint' means either (a) the written accusation of an offense against the laws of the United States filed by any person with a United States commissioner in his capacity as a trial magistrate; or (b) the written accusation filed by any person with a United States commissioner or other person authorized by law to act as a committing magistrate for the purpose of bringing the person charged therein before the magistrate to be held to answer in the district court." This provision was drafted in accordance with the direction of the Advisory Committee that the word "complaint" be defined in this section to show the several senses in which the word may be used and the courts in which it is used. Subsection (b) was entitled "Definition."

The fourth draft, dated May 18, 1942, was the first to contain a separate rule devoted entirely to complaint, and Rule 3 was entitled "The Complaint." Subdivision (a) entitled "The Accusation before the United States or Other Magistrate" provided: "A complaint may be used to charge an offense over which a commissioner or other officer has jurisdiction as a magistrate to issue a warrant of arrest or a summons, to commit the accused or to place him under bond for appearance before the district court, or to try the accused." Subsection (b) entitled "Rules Governing The Complaint" provided: "The complaint shall be subject to the same rules as the information, so far as applicable."

Rule 3 of the fifth draft, dated June, 1942, provided: "The complaint shall be a written statement of essential facts constituting an offense and shall be sworn to before a committing magistrate. A complaint may be used to charge an offense with respect to which a commissioner or other magistrate has jurisdiction to issue a warrant of arrest or a summons, or to commit the accused or to admit him to bail for appearance before the district court." There was a helpful committee annotation.

A draft, known as Preliminary Draft, dated May, 1942, identical with the fifth draft, on this rule was submitted to the Supreme Court for comment. The Court as a body offered no comment on Rule 3. One judge commented that Rule 3 refers to a magistrate or a committing magistrate, but that no such officer was known in the federal system.

The sixth draft, dated Fall, 1942, omitted the second sentence of the fifth draft. Other provisions of the draft made it unnecessary. It now provided: "The complaint shall be a written statement of the essential facts constituting the offense charged and shall be made upon oath or affirmation before a commissioner and filed with the commissioner." The term "committing magistrate" was changed to "commissioner" because of the comment by the Supreme Court previously mentioned and because the rules are restricted to commissioners. The rule added the requirement that the complaint be filed with the commissioner. Greater definiteness in procedure is thereby secured. Furthermore the parallelism of the complaint with the indictment or information is more clearly indicated.

Rule 3 of the First Preliminary Draft (seventh committee draft) dated May, 1943, provided: "The complaint is a written statement of the essential facts constituting the offense charged made upon oath or affirmation before a commissioner and filed with him." Thus it was essentially the same as the sixth draft.

The following comments were made to the Advisory Committee on the rule as it appeared in the First Preliminary Draft. Judge Edwin R. Holmes of the Fifth Circuit would have the rule read: "The complaint shall be made in writing, upon oath or affirmation, before a commissioner, and filed with him."¹ Judge John E. Miller of the Western District of Arkansas would strike the word "commissioner" and substitute the words of the statute defining the officials who may issue warrants. This should be done although Rule 50(a)(2) of the draft provided that the Rules do not apply to criminal proceedings before any other officers empowered to commit. The complaint should be uniform, although subsequent proceedings may not at all times be uniform. James J. Giblin, Assistant United States Attorney for the District

¹ Comments, Recommendations and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure, Vol. I, p. 7 (1943).

of Minnesota, thought it well that the rule allowed state judges to apply their own procedure as they are not familiar with federal procedure. Joseph T. Votava, United States Attorney for the District of Nebraska thought that Rule 3, at least by implication contemplated that all complaints shall be filed before a United States Commissioner.² It impliedly eliminated the officials named in the then 18 U.S.C. section 591. This was well and good. But it should be possible to file a complaint before a United States judge as well as before a commissioner. This would permit filing of complaints in emergencies when a commissioner is ill or the office of commissioner is vacant in a particular locality. Victor E. Anderson, United States Attorney for the District of Minnesota stated: "This rule limits the filing of complaints before United States Commissioners. It sometimes happens that no commissioner is available. We suggest leaving in effect the right to file complaints before those officers as stated in Title 18 Section 591".³

The Second Preliminary Draft (eighth committee draft) dated February, 1944 provided: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath or affirmation before a commissioner." The former provision for filing of the complaint with the commissioner was omitted.

The following comments were made to the Advisory Committee on the rule as it appeared in the Second Preliminary Draft. James B. McNally, United States Attorney for the Southern District of New York, thought that the rule should deal with the issue whether or not the complaint must be based on personal knowledge or on information and belief.⁴ It is rare that complaints are filed by persons other than agents or representatives of the federal government. But the rule does not require filing only by agents of the federal government. The rule should be amended to provide that such agents may file on information and belief, but other persons must file on personal knowledge. The agent may have gotten his information from agents in other districts. The training of agents is such that they will not furnish reports without basis. But in those few cases when private in-

² Id. at 8.

³ Id., Vol. II, p. 311 (1953).

⁴ Id., Vol. III, p. 5 (1944).

dividuals file complaints, there are possibilities afforded to irresponsible individuals to harass other persons. At the Conference of the United States Attorney held at Saint Louis, Missouri, it was moved that they "recommend to the Committee that no complaint should be filed before a Commissioner unless such complaint was first authorized by the United States Attorney."⁵

The Report of the Advisory Committee (ninth committee draft) dated June, 1944, was similar to the eighth draft as to its first sentence. To the second sentence was added "or other officer empowered to commit persons charged with offenses against the United States." Thus, the use of state officials was contemplated. The Supreme Court adopted this version without any changes.

II. *The Law Prior to the Federal Criminal Rules*

The third section of the Act of September 24, 1789,⁶ provided that for any federal crime, the offender might, by any justice or judge of the United States, or by any state justice of the peace where the offender may be found, agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed, as the case may be for trial before the federal court. When commissioners were established they were to apply similar procedure. Federal procedure was assimilated to state procedure.⁷ It was finally settled that this applied specifically to the complaint.⁸ For example in a criminal prosecution in New York the New York law would apply to the complaint. However in one case a circuit court laid down a rule of court on the subject without making any reference to the state law.⁹

⁵ Id., Vol. IV, p. 4 (1944).

⁶ 5 Stat. 91. This statute and the subsequent statutes are discussed in *United States v. Maresca*, 266 Fed. 713, 720 (S.D.N.Y. 1920). At the date of the rules the statute was 18 U.S.C. sec. 591.

⁷ See the opinion of Circuit Justice Curtis in *United States v. Rundlett*, Case No. 16, 208, 27 Fed. Cas. 915, 916 (C.C.D.N.H. 1854). His views were followed in *United States v. Horton*, Case No. 15,393, 26 Fed. Cas. 375 (C.C.E.D. Mo. 1873); and *United States v. Ruroede*, 220 Fed. 210, 212 (S.D.N.Y. 1915). The latter case specifically involved a complaint.

⁸ *United States v. Collins*, 79 Fed. 65, 66 (S.D.Calif. 1897); *United States v. Ruroede* 220 Fed. 210, 212 (S.D.N.Y. 1915). The court relied on a case involving removal to another district in which the indictment was assimilated to a complaint. *United States v. Greene*, 100 Fed. 941, 943 (S.D.N.Y. 1900).

⁹ In re Rule of Court, 20 Fed. Cas. 1336, 1337 (C.C.N.D.Ga. 1877). In *Ex parte Lane*, 6 Fed. 34, 38 (D. Mich. 1881) the court stated: "It is very singular that there are so few cases in which the requirements of a proper complaint upon oath are discussed." There is nothing in the opinion clearly indicating that the court felt itself bound by state law.

A complaint is one of the legally accepted methods of instituting a criminal proceeding, the other being grand jury action. An individual may "make a written complaint on oath before an examining and committing magistrate, and obtain a warrant of arrest."¹⁰ This is in conformity with the federal constitution, and "consonant with the principles of natural justice and personal liberty founded in the common law."¹¹ The complaint need not come from the United States Attorney. It may come from a private citizen under oath.¹²

The significance of a complaint is pointed out in the following language of the Supreme Court: "A criminal charge exists only when a formal written complaint has been made against the accused and a prosecution initiated."¹³ Where the arrest precedes the indictment or information and is made in obedience to a warrant, the making of the complaint is the commencement of the prosecution.¹⁴ It is interesting to note that in federal civil procedure the complaint is always the first step. Rule 3 of the Federal Rules of Civil Procedure provides: "A civil action is commenced by filing a complaint with the court."

With respect to the drafting of the complaint the Supreme Court has stated: "While the duty of a committing magistrate is to take complaints and issue warrants upon them, which may perhaps imply that they are written by the person making them, the general if not the universal practice, is for the magistrate to put them in writing."¹⁵ Earlier, Circuit Justice Bradley had stated: "In other words, the magistrate ought to have before him

¹⁰ *United States v. Kilpatrick*, 16 Fed. 765, 769 (W.D.N.C. 1883). See also *United States v. Simon*, 248 Fed. 980 (E.D.Pa. 1916).

¹¹ *United States v. Kilpatrick*, 16 Fed. 765, 769 (W.D.N.C. 1883).

¹² *United States v. Skinner*, No. 16, 309, 27 Fed. Cas. 1123, 1124 (C.C.N.Y. 1818). The opinion was by Circuit Justice Livingston, who states that neither the President nor the United States Attorney should interfere. One case left undecided whether there might be a valid complaint, by a private citizen not approved in writing by the United States Attorney. *United States v. Sapinkow*, 90 Fed. 654, 660 (C.C.S.D.N.Y. 1898).

¹³ *United States v. Patterson*, 150 U.S. 65, 68, 14 Sup. Ct. 20, 37 L.Ed. 999 (1893). It was held that Congress had provided no compensation to United States Commissioners for acts done prior to the existence of a criminal charge.

¹⁴ See *Morrow v. State*, 140 Neb. 592, 300 N.W. 843, 844 (1941). But compare *People v. Clement*, 72 Mich. 116, 40 N.W. 190 (1888) requiring also that the warrant be issued and placed in the hands of the person who is to execute it. Compare *Orfield*, *Criminal Procedure From Arrest to Appeal* 4-5 (1947).

¹⁵ *United States v. Ewing*, 140 U.S. 142, 146, 11 S.Ct. 743, 35 L.Ed. 388 (1891). For such services the Commissioner may recover compensation from the United States.

the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination."¹⁶

A complaint though quite general in terms is valid if it sufficiently apprises the defendant of the nature of the offense with which he is charged.¹⁷ This is more clearly so when it sets forth the gist of the offense. Mr. Justice Brown speaking for the Supreme Court has stated: "The technicalities of an indictment are not requisite in a complaint."¹⁸

While numerous cases have held that less precision is necessary in a complaint than in an indictment, a defendant is entitled "at all times to be apprised of the crime of which he is accused, and also of the facts charged constituting that crime."¹⁹ It follows that a complaint inadequate in this respect followed by an arrest is subject to attack by habeas corpus.²⁰

In some cases where the complaint is attacked there may have been an indictment before the attack. In such case the court in considering the sufficiency of the complaint may look at the indictment as well as the complaint. If both considered together are sufficient, the complaint will be upheld.²¹

Suppose the complaint is merely on information and belief. This would not be valid if not valid by the law of the state in which the federal court sat. Since California law did not permit such a complaint, a federal court sitting in California would reject such a complaint.²² One of the earliest decisions on complaints held that a complaint made solely upon information derived from

¹⁶ *In re Rule of Court*, 20 Fed. Cas. 1336, 1337, 3 Woods 502 (C.C.N.D.Ga. 1877).

¹⁷ *United States v. Wood*, 26 F.2d 908, 910 (N.D.Texas 1927), affirmed *Wood v. United States*, 26 F.2d 912 (5th Cir. 1928). Habeas corpus was therefore denied.

¹⁸ *Rice v. Ames*, 180 U.S. 371, 379, 21 S.Ct. 406, 45 L.Ed. 577 (1901). Habeas corpus was therefore denied. For an example of a complaint see *In re Palliser*, 136 U.S. 256, 257-258, 10 S.Ct. 1024, 34 L.Ed. 514 (1890).

¹⁹ *United States v. Ruroede*, 220 Fed. 210 (S.D.N.Y. 1915). This case was cited by the Supreme Court in *Go-Bart Co. v. United States*, 282 U.S. 344, 355, 515 S.Ct. 153, 75 L.Ed. 374 (1930). For an early interstate rendition case to the same effect see *Ex parte Smith*, 22 Fed. Cas. 373, Case No. 12,968 (C.C.D.Ill. 1843).

²⁰ *Ibid.* But where the complaint is sufficient, habeas corpus will be denied. *Adair v. Benn*, 27 F.2d 126 (9th Cir. 1928).

²¹ *Rice v. Ames*, 180 U.S. 371, 21 S.Ct. 406, 45 L.Ed. 577 (1901); *United States v. Mayer*, 22 F.2d 827, 828 (M.D.Pa. 1927).

²² *United States v. Collins*, 79 Fed. 65, 66 (S.D.Calif. 1897). See also *Ex parte Lane*, 6 Fed. 34, 38 (D. Mich. 1881) in which the court cited cases from both the local state court decisions and from other states.

others whose names are not given, by a person who swears that he has good reason to believe and does believe that a named person has committed a described offense violates the Fourth Amendment.²³

In a case involving international extradition and therefore arguably narrow in its scope²⁴ the Supreme Court held that a complaint if made upon information and belief is invalid; but it need not be made upon the personal knowledge of the complainant if he annexes to the complaint a copy of the indictment found in the foreign country or the deposition of a witness having personal knowledge of the facts. The court stated: "A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a mere suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. . . . So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts."²⁵

In a subsequent case the Supreme Court held invalid a complaint which was verified merely on information and belief and which did not state facts sufficient to constitute an offense.²⁶

The commission of a crime must be shown by facts positively stated.²⁷ The oath or affirmation required is of facts and not opinions or conclusions. If the complaint is made on information or belief, it must give the grounds of belief and sources of information. If the complaint is not based on personal knowledge of the

²³ *In re Rule of Court*, 20 Fed. Cas. 1336, 1337, 3 Woods 502 (C.C.N.D.Ga. 1877).

²⁴ The Supreme Court held that the state rules as to continuances did not apply to a case of foreign extradition. *Rice v. Ames*, 180 U.S. 371, 376-378, 21 S.Ct. 406, 45 L.Ed. 577 (1901).

²⁵ *Rice v. Ames*, 180 U.S. 371, 374-375, 21 S.Ct. 406, 45 L.Ed. 577 (1901). This case is cited in *United States v. Walker*, 197 F.2d 287, 289. (2d Cir. 1952). It is clarifyingly summarized and distinguished in *United States v. Dolan*, 113 F.2d 757, 762 (D.Conn. 1953). It is cited in *De Hardit v. United States*, 224 F.2d 673, 677 (4th Cir. 1955); and in *Giordenello v. United States*, 241 F.2d 575, 579 (9th Cir. 1957).

²⁶ *Go-Bart Co. v. United States*, 282 U.S. 344, 355, 51 S.Ct. 153, 75 L.Ed. 374 (1930). This case was followed in *United States v. Kennedy*, 5 F.R.D. 310, 312 (D.Colo. 1946).

²⁷ *United States ex rel King v. Gokey*, 32 F.2d 793, 794 (N.D.N.Y. 1929). It has been pointed out that this decision "was based on an interpretation of a local state statute." Robinson, *Cases on Criminal Law and Procedure* 310 (1941).

complainant and is not supported by other proof, the commissioner has no jurisdiction to issue a warrant.

The complaint must be accompanied by an oath.²⁸ The oath may not be taken before a notary public.²⁹

A waiver of preliminary examination waives informalities or technical objections to the complaint.³⁰ But there is no waiver where the complaint on its face discloses no facts indicating the commission of a crime.³¹ Either the complaint or the warrant must state facts constituting the crime that is charged. Process on a complaint not stating facts constituting the crime charged is void. It seems also to have been held that there is no waiver where the complaint is not based on the personal knowledge of the complainant.³² It was held too late to move in arrest of judgment on the ground that the oath was taken before a notary public.³³

The validity of a complaint may be attacked by a motion to quash the complaint and set aside a warrant and service thereof.³⁴

Under the present Federal Criminal Rule 48(a) the government may by leave of court file a dismissal of a complaint. But prior to the rules this could not be done while an examination of the accused is pending before the commissioner.³⁵

Where the prosecution is by information, an early case held that it must be preceded by a complaint, arrest, and examination.³⁶ But an indictment may be found and presented by a grand jury without a preliminary formal complaint or arrest.³⁷

²⁸ *In re* Rule of Court, 20 Fed. Cas. 1336, 1337, 3 Woods 502 (C.C.N.D.Ga. 1877).

²⁹ *United States v. Smith*, 17 Fed. 510, 511 (C.C.D.Mass. 1883). This case involved a summary complaint for an offense on the high seas. The oath may be taken before a de facto commissioner. *Starr v. United States*, 164 U.S. 627, 631, 17 S.Ct. 223, 41 L.Ed. 577 (1897).

³⁰ *United States v. Ruroede*, 220 Fed. 210, 213 (S.D.N.Y. 1915); *United States ex rel King v. Gokey*, 32 F.2d 793, 795 (N.D.N.Y. 1929). Whether there was a waiver was regarded as depending on state law in *United States v. Collins*, 79 Fed. 66, 68 (S.D.Calif. 1897).

³¹ *United States v. Ruroede*, 220 Fed. 210, 213 (S.D.N.Y. 1915).

³² *United States ex rel King v. Gokey*, 32 F.2d 793, 795 (N.D.N.Y. 1929). But this view was later rejected in *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952).

³³ *United States v. Smith*, 17 Fed. 510, 512 (C.C.D.Mass. 1883).

³⁴ *United States v. Mayer*, 22 F.2d 827 (M.D.Pa. 1927).

³⁵ *United States v. Schumann*, 27 Fed. Cas. 984, 7 Sawy. 439 (C.C.D.Calif. 1866).

³⁶ *United States v. Shepard*, Case No. 16,273, 27 Fed. Cas. 1056, 1059 (E.D.Mich. 1870). Compare *United States v. Pickard*, 207 F.2d 472, 474 (9th Cir. 1953).

³⁷ *United States v. Baumert*, 179 Fed. 735, 742 (N.D.N.Y. 1910).

III. *Interpretation of Rule 3*

Rule 3 does not provide that it may be used to charge an offense with respect to which a commissioner has jurisdiction to try the accused since the rules do not purport to cover trials before commissioners.³⁸ No double meaning is thus given to the term "complaint" as meaning both the basis for an arrest or a summons and the principal written accusation. Nor is the term "complaint" made to overlap with the "information" provided for in Rule 7.

Under Rule 3 the complaint may be made before state justices of the peace or magistrates. But under Rule 54(a) (2) the federal rules do not apply to criminal proceedings before such officials.³⁹ As of 1942 there were only approximately 35 state officials who conducted such proceedings, compared with 1,080 Commissioners.⁴⁰ During the drafting of the rules, some had criticized the use of state officials as the Supreme Court had held that arrested persons must be brought forthwith before the nearest authorized officials for preliminary examination; and in almost every case it would be possible to argue that commitment could have been had earlier before a different state or local official.⁴¹

The complaint in setting forth the "essential facts" may allege facts which are essentially the conclusions or inferences of the complainant from underlying facts.⁴² An example is an allegation as to defendant's state of mind, or that the defendant fraudulently with intent to evade filed a tax return.

³⁸ For the rule as to complaint in cases tried by commissioners see Rule 1, set out in 61 Sup. Ct. CLV (1941). The rule uses the term "information" instead of "complaint." It provides: "A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged offense was committed and the place where it was committed and a description of the alleged offense."

³⁹ It has been concluded that the state officials would apply local practice by Dession, "The New Federal Rules of Criminal Procedure, I," 55 Yale L.J. 695, 705 (1946).

⁴⁰ Report on United States Commissioners, submitted to the Judicial Conference by the Administrative Office of the United States Courts, (1942). See also annotation of the Second Preliminary Draft of the Federal Rules of Criminal Procedure.

⁴¹ Dession, "The Proposed Federal Rules of Criminal Procedure," 18 Conn. Bar. J. 58, 61 (1944).

⁴² *United States v. Dolan*, 113 F.Supp. 757, 761 (D. Conn. 1953). But in *Darnall v. United States*, 33 A.2d 734, 736 (Mun. Ct. App. D.C. 1943), a complaint merely reciting the police officer's legal conclusion that defendant was maintaining a disorderly house was held invalid. For general discussion of complaints see 22 C.J.S. sections 303-315, pp. 456-467.

A complaint which substantially follows the statutory language of the offense charged is sufficient.⁴³ Since an indictment in the words of a statute may be sufficient, a complaint in like form may likewise be.⁴⁴

The first case to discuss complaints under the Federal Rules of Criminal Procedure involved the validity of an information.⁴⁵ The court cited favorably the following language of the Supreme Court: "The complaint, which in substance is recited in the warrant, was verified merely on information and belief and does not state facts sufficient to constitute an offense."⁴⁶

A complaint should be based upon the complainant's personal knowledge.⁴⁷ If it is not so based and is unsupported by other proof, the United States Commissioner has no jurisdiction to issue a warrant for arrest. Even where the complaint is filed by the United States Attorney or an Assistant United States Attorney he must have personal knowledge.⁴⁸ This is not changed by the statute 18 U.S.C.A. sec. 3045 authorizing such officials to sign complaints for violations of internal revenue laws.

As to the requirement that the complaint be made on personal knowledge of the complainant, it is enough for the issuance of a warrant that a complaint purports to be on the knowledge of the complainant.⁴⁹ The United States Supreme Court has recently

⁴³ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952). Violation of the National Stolen Property Act, 18 U.S.C.A. sec. 2314, was involved. The complaint is set out in full at 197 F.2d 289, n.5. To similar effect see *Giordenello v. United States*, 241 F.2d 575, 579 (5th Cir. 1957). Violation of the Narcotics Drug Import and Exports Act, 21 U.S.C.A. sec. 174 was involved. The complaint is set out at 241 F.2d 576 n.2.

⁴⁴ This analogy is attacked on the ground that the cases passing on indictments merely dealt with the indictment as a pleading, whereas the complaint is something more than a pleading as it is a requisite for the arrest. *Rives*, Cir. J., dissenting in *Giordenello v. United States*, 241 F.2d 575, 580-581 (5th Cir. 1957).

⁴⁵ *United States v. Kennedy*, 5 F.R.D. 310, 312 (D.Colo. 1946).

⁴⁶ *Go-Bart Co. v. United States*, 282 U.S. 344, 355, 51 S.Ct. 153 75 L.Ed. 374 (1929).

⁴⁷ *United States v. Langsdale*, 115 F.Supp. 489, 491 (W.D.Mo. 1953). The court cited as in accord *United States ex rel. King v. Gokey*, 32 F.2d 793, 794 (N.D.N.Y. 1929). The complaint in this case is set forth at 115 F.Supp. 489-490. This holding was accepted as correct in *United States v. De Hardit*, 130 F.Supp. 110, 116 (E.D.Va. 1954) but personal knowledge was found. See 32 Ind. L.J. 332, 342 (1957).

⁴⁸ But the court conceded: "The law is not clear as to just what personal knowledge may be necessary in order to enable the District Attorney to sign a complaint." 115 F.Supp. 493. The court agreed that a United States attorney must have personal knowledge in *United States v. De Hardit*, 120 F.Supp. 110, 116 (E.D.Va. 1954).

⁴⁹ *Giordenello v. United States*, 241 F.2d 575, 579 (5th Cir. 1957). The court cited as in accord *Rice v. Ames*, 180 U.S. 371, 21 S.Ct. 406, 45 L.Ed. 577 (1901); *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952).

held that even a grand jury indictment may be based entirely on hearsay evidence.⁵⁰ It would therefore appear that a complaint may be based partially on the evidence of others than the complainant.⁵¹

Where a complaint appears on its face to be based on personal knowledge of the complainant, the complaint need not set forth the source of the complainant's information.⁵² An arrest based on such a complaint would not be illegal.

When a complaint is made upon information and belief, it is the duty of the commissioner to make inquiry of the complainant as to the sources of his information and the grounds of his belief.⁵³ Such inquiry will enable the commissioner to determine in his own mind whether there is probable cause to believe that an offense has been committed, and thereby avoid the issuance of process and the arrest of an accused person on the mere suspicion of an irresponsible person.

In most states it is sufficient that the complaint is on information and belief.⁵⁴ Federal Criminal Rule 3 is silent on the matter, thus leaving it to local practice.⁵⁵ It follows that while a good many cases seem to insist upon personal knowledge and belief, this is because such cases have arisen in states where such a requirement exists and where the federal district court chooses to follow such practice.⁵⁶

Where the complaint is purportedly based on actual knowledge the Commissioner need not question the complainant as to the sources of his information.⁵⁷ But it would be the better part of wisdom in every case to make inquiry, in order to ascertain the

⁵⁰ *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

⁵¹ *Giordenello v. United States*, 241 F.2d 575, 579 (5th Cir. 1957).

⁵² *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952). The court cited as in accord *Rice v. Ames*, 180 U.S. 371, 376, 21 S.Ct. 406, 45 L.Ed. 577 (1901).

⁵³ *De Hardit v. United States*, 224 F.2d 673, 677 (4th Cir. 1955). But in the case itself it appeared that the complainant, the United States Attorney, acted upon actual knowledge.

⁵⁴ Orfield, *Criminal Procedure From Arrest to Appeal* 76 (1947). For citation of cases see 22 C.J.S., sec. 309, p. 462 (1940).

⁵⁵ Federal Criminal Rule 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with the rules or with any applicable statute."

⁵⁶ The federal district court need not follow the state practice. The annotation to Rule 57(b) states: "One of the purposes of this rule is to abrogate any existing requirement of conformity to state procedure on any point whatsoever."

⁵⁷ *De Hardit v. United States*, 224 F.2d 673, 677 (4th Cir. 1955).

extent of the complainant's knowledge, so as to be assured of the existence of probable cause. Such procedure will safeguard the government against subsequent attacks upon the complaint.

It would seem that where the complaint is signed by one person, the oath must be taken by such signer and not by another person.⁵⁸ It has been held in New York that a complaint signed by another than the complaining officer where the complaining officer swore to the facts in the complaint is not open to attack.⁵⁹

The Commissioner's Manual as revised by the Director of the Administrative Office of the United States courts to incorporate changes necessitated by the adoption of the Federal Rules of Criminal Procedure states:

"The complaint is not necessarily filed on the mere suggestion of an investigating officer or other person. On the contrary, the commissioner should always examine on oath the person making the complaint as well as any witness who may appear before him. The Commissioner should reduce the complaint to writing and require it to be dated, signed, and sworn to by at least one complainant and filed with him."⁶⁰

The complaint under Rule 3 is not the same as the institution of a complaint under 26 U.S.C.A. sec. 3748 which provides: "Where a complaint is instituted . . . the time shall be extended until the discharge of the grand jury at its next session within the district." Under this statute the complaint must be accepted by the Commissioner as a proper foundation for instituting a prosecution. Rule 3 involves less than that. It involves "merely the presentation to the Commissioner of a sworn writing sufficient in content to satisfy the definition of a complaint contained in Rule 3."⁶¹

Where at the hearing before the commissioner after the filing of a complaint the defendant attacks the complaint and seeks dismissal thereof on the ground that the facts alleged therein are not within the personal knowledge of the complainant, the Com-

⁵⁸ *Morrow v. State*, 140 Neb. 592, 300 N.W. 843, 845 (1941). Here complainant was the county attorney and the oath was taken by the deputy county attorney. One judge dissented.

⁵⁹ *People v. Kopf*, 304 N.Y. 683, 107 N.E. 2d 597 (1952) noted 4 *Syracuse L. Rev.* 150 (1952).

⁶⁰ Page 5. It is quoted in *United States v. Dolan*, 113 F. Supp. 757, 761 (D. Conn. 1953).

⁶¹ *United States v. Dolan*, 113 F. Supp. 757, 761 (D. Conn. 1953).

missioner may decline to pass upon the question and leave the question for determination by the district court.⁶²

The defendant is not entitled to be present when the complaint is made.⁶³ It is only later at his arrest⁶⁴ and appearance before the commissioner⁶⁵ and preliminary examination⁶⁶ that his presence is called for. Nor does he have the right to counsel at this stage.⁶⁷ He may be represented by counsel retained by him if he so chooses at the proceedings before the commissioner. Under Rule 5(b) the "commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination."

Defects in the complaint may be waived. When the defendant waives preliminary examination, he cannot later attack informalities or irregularities in the complaint or in the warrant.⁶⁸ Thus it appears that attacks on the complaint should be made at the preliminary examination. At such time it might for example be alleged that the complainant lacked personal knowledge; that is to say that the complaint was not sustained by legally competent evidence.⁶⁹

The scope of waiver is wide. It applies to the objection that the complainant did not have personal knowledge of the facts.⁷⁰ It applies to the sufficiency of the statement of essential facts.⁷¹

⁶² *United States v. Langsdale*, 115 F. Supp. 489, 490 (W.D.Mo. 1953). As the Supreme Court has stated the Commissioner acts "as a mere officer of the district court in proceedings of which that court had authority to take control at any time." *Go-Bart Co. v. United States*, 282 U.S. 344, 354, 51 S. Ct. 153, 75 L. Ed. 374 (1930).

⁶³ See Criminal Rule 43.

⁶⁴ See Criminal Rule 4(c).

⁶⁵ See Criminal Rule 5(a).

⁶⁶ See Criminal Rule 5(c).

⁶⁷ See Criminal Rule 44; Fellman, "The Constitutional Right to Counsel in Federal Courts," 30 Neb. L. Rev. 559, 565-566, 587-589 (1951).

⁶⁸ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952). In this case the defendant waived preliminary examination and consented to his removal to another federal district. The court cited as in accord *United States v. Ruroede*, 220 Fed. 210, 213 (S.D.N.Y. 1915). It also made reference to *United States ex rel. King v. Gokey*, 32 F.2d 793, 795 (N.D.N.Y. 1929).

⁶⁹ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952); *United States v. Langsdale*, 115 F. Supp. 489, 493 (W.D.Mo. 1953).

⁷⁰ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952). For an earlier contrary view see *United States ex rel. King v. Gokey*, 32 F.2d 793, 795 (N.D.N.Y. 1929).

⁷¹ *Giordenello v. United States*, 241 F.2d 575, 578 (5th Cir. 1957). But the court conceded that there would be no waiver if there is no suggestion in the complaint of the gist of the offense as invalidity is plain on the face of the complaint. The court therefore distinguished *United States v. Ruroede*, 220 Fed. 210, 213 (S.D.N.Y. 1915).

This is true though the defendant's rights under the Fourth Amendment are arguably involved.⁷²

It follows that it is too late to attack the validity of the complaint for the first time on appeal.⁷³ A dissenting judge has argued that such attack is permissible upon appeal but not on the statutory motion to vacate.⁷⁴

It also follows that it is too late to attack the validity of a complaint for the first time on a statutory motion under 28 U.S.C.A. sec. 2255 to vacate a judgment of conviction and sentence.⁷⁵

There is no waiver where the defendant appears before the Commissioner and attacks the complaint on the ground that it is not based on personal knowledge of the complainant.⁷⁶ The Commissioner may decline to pass upon the question and leave it to the district court. Since the Supreme Court has held that mere giving of a bail bond without objection to the warrant of arrest does not waive the invalidity of a warrant,⁷⁷ it seems that the same result would follow in a similar case involving the validity of a complaint.

One serious effect of an invalid complaint is that it will not toll the running of the statute of limitations as to a crime. The defendant may thus be able to secure the dismissal of an indictment following such invalid complaint where the statute had run before the return of the indictment to the grand jury.⁷⁸

Rule 3 is intimately linked with Rule 5 on "Proceedings Before the Commissioner." Rule 5 by its terms applies to those cases where there has been an arrest without a warrant and an arrest "under a warrant issued upon a complaint" previously made upon oath before a commissioner or other officer.⁷⁹

⁷² *Giordenello v. United States*, 241 F.2d 575, 578 (5th Cir. 1957). But it seems questionable that rights under the Fourth Amendment are involved until the defendant is arrested or summoned. *De Hardit v. United States*, 221 F.2d 673, 677 (4th Cir. 1955).

⁷³ This may be implied from the majority opinion in *Giordenello v. United States*, 241 F.2d 575 (5th Cir. 1957).

⁷⁴ *Id.* at 580, 584.

⁷⁵ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952).

⁷⁶ *United States v. Langsdale*, 115 F. Supp. 489, 490, 493 (W.D.Mo. 1953).

⁷⁷ *Albrecht v. United States*, 273 U.S. 1, 9, 47 S. Ct. 250, 71 L. Ed. 505 (1927).

⁷⁸ *United States v. Langsdale*, 115 F. Supp. 489, 490 (W.D.Mo. 1953). See also *United States v. Dolan*, 113 F. Supp. 757 (D. Conn. 1953); *De Hardit v. United States*, 224 F.2d 673 (4th Cir. 1955).

⁷⁹ *United States v. Pickard*, 207 F.2d 472, 473 (9th Cir. 1953).

Where the prosecution is by information Rules 3 through 5 do not apply so as to require a preliminary examination. An information should not be dismissed because the requirements of Rules 3 through 5 have not been met.⁸⁰ Thus no complaint need be filed with a United States commissioner.

The validity of the complaint is frequently attacked by alleging that an arrest based upon it is invalid.⁸¹ Sometimes validity is attacked upon a motion to dismiss an indictment.⁸² In general the complaint is *prima facie* valid, and the burden of showing its invalidity rests upon the defendant.⁸³

The Fourth Amendment providing against unreasonable searches and seizures does not apply to the complaint.⁸⁴ It applies only when an arrest is actually made upon the complaint.

What about the relation of the complaint to the principal accusations in a criminal proceeding such as an indictment or an information? From some points of view the relation need not be close. Under Rule 5(c) the commissioner is to hold the defendant to answer in the district court if it appears to him that there is probable cause to believe that an offense has been committed and that the defendant has committed it. It is quite immaterial that the commissioner finds an offense committed other than that alleged in the complaint.⁸⁵ But from the point of view of the running of the statute of limitations the complaint must charge the same offense as that on which the indictment is laid.⁸⁶ The validity of the complaint may be waived. But for a valid conviction there must be some formal and sufficient accusation

⁸⁰ *United States v. Pickard*, 207 F.2d 472 (9th Cir. 1953). A contrary result was reached in *United States v. Shepard*, Case No. 16,273, 27 Fed. Cas. 1056, 1059 (E.D.Mich. 1870). The court there asserted that there must first be a complaint, arrest, and examination under section 33 of the Act of September 24, 1789. 5 Stat. 91.

⁸¹ *United States v. Walker*, 197 F.2d 287, 289 (2d Cir. 1952); *Giordenello v. United States*, 241 F.2d 575, 576 (5th Cir. 1957).

⁸² *United States v. De Hardit*, 120 F. Supp. 110 (E.D.Va. 1954). Such practice is criticized in *Albrecht v. United States*, 273 U.S. 1, 10 n. 11, 47 S.Ct. 250, 71 L.Ed. 505 (1927).

⁸³ *United States v. De Hardit*, 120 F. Supp. 110, 116 (E.D.Va. 1954). The court cited as in accord *Gracie v. United States*, 15 F.2d 644, 646 (1st Cir. 1926), involving a search warrant.

⁸⁴ *De Hardit v. United States*, 224 F.2d 673, 677 (4th Cir. 1955). Compare, however, *Giordenello v. United States*, 241 F.2d 575, 578 (5th Cir. 1957); *In re Rule of Court*, 20 Fed. Cas. 1336, 1337, 3 Woods 502 (C.C.N.D.Ga. 1877).

⁸⁵ Orfield, *Criminal Procedure From Arrest to Appeal* 89-90 (1947).

⁸⁶ *United States v. Dolan*, 113 F.Supp. 757, 762 (D.Conn. 1953).

against the defendant. Thus if there is neither an indictment nor an information, the defendant cannot waive.⁸⁷

The appendix of Forms at the end of the Rules of Federal Criminal Procedure contains no form for the complaint. But several cases set forth complaints which have been sustained.⁸⁸

IV. *The Complaint in English Criminal Procedure*

Justices of the peace were instituted in England in 1326. They were "assigned to keep the peace." In 1360 they were empowered "to take and arrest all those they may find by indictment or by suspicion and put them in prison."⁸⁹ But Stephen concludes that no statute enabled them directly to take a complaint "as to the commission of a crime and issue a summons or warrant for the apprehension of the suspected person."⁹⁰ Finally in 1848 a statute clearly provided that justices of the peace could upon complaint issue a summons, and if the charge is made on oath and in writing, a warrant.⁹¹ Today the first step in ordinary as well as in summary criminal procedure in England is to lay a complaint, or as the English put it, an information before a justice of the peace.⁹² The complaint may be made where the offense was committed or where the offender is. The English textbooks and treatises have remarkably little to say about the details of the complaint.

V. *Other Model Reforms of the Complaint*

Section 1 of the American Law Institute Code of Criminal Procedure, dated 1931 is entitled "Duty of Magistrate When

⁸⁷ *Albrecht v. United States*, 273 U.S. 1, 8, 47 Sup. Ct. 250, 71 L.Ed. 505 (1927). See Orfield, *Criminal Procedure From Arrest to Appeal* 204-208 (1947).

⁸⁸ *United States v. Walker*, 197 F.2d 287, 289 n. 5 (2d Cir. 1952); *Giordenello v. United States*, 241 F.2d 575, 576 n.2 (5th Cir. 1957).

⁸⁹ 34 Edw. 3 chap. 1 (1360).

⁹⁰ 1 Stephen, *History of Criminal Law of England* 190 (1883). In 4 Blackstone, *Commentaries* 290 (1769) the author concludes: "A warrant may be granted . . . ordinarily by justices of the peace. . . . It is fitting to examine upon oath the party requiring a warrant." The common law did not require that a written complaint be made. Orfield, *Criminal Procedure From Arrest to Appeal* 10 (1947). But the complaint had to be under oath and before the justice of the peace himself, not before his clerk. *Caudle v. Seymour*, 1 Q.B. 889, 113 Eng. Rep. 1372 (1847).

⁹¹ 11 & 12 Vict. Chap. 42, sections 1, 2 and 8.

⁹² Kenny, *Outlines of Criminal Law*, sec. 691, p. 471 (Turner edition 1952).

Complaint Made." It provides: "When a complaint is made before a magistrate that an offense has been committed, he shall examine on oath the complainant and any witness he may produce, take their depositions and cause them to be subscribed by the persons making them."

Rule 4 of the Uniform Rules of Criminal Procedure drafted by the Commissioners of Uniform Laws and approved in 1952 provides: "The complaint is a statement of the essential facts constituting the offense charged. It shall be made before a magistrate or other officer empowered to commit persons with offenses against the State, who shall examine on oath the complainant and any witnesses he may produce, take their statements and cause them to be subscribed by the persons making them."⁹³ This rule is obviously modeled in part on the American Law Institute Code and in part on Rule 3 of the Federal Rules of Criminal Procedure.

⁹³ The comment on this rule was as follows: "See Fed. R. Crim. Proc., Rule 3, and A.L.I. Code, sec. 1. Existing State law and practice are generally similar; see Commentaries, A.L.I. Code, 177-180." An earlier draft of this rule used the term "depositions" instead of "statements." It pointed out that similar statutes existed in 22 states. In 9 states no provision is made for taking depositions in writing. In 16 states no express provision is made for examination by the magistrate of the complainant or other witnesses. In 2 states there is provision for examination of the complainant but not of other witnesses.